

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2360

To Be Argued By:

JOHN D. FEERICK

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

AERONAVES DE MEXICO, S.A.,

Plaintiff-Appellant,

—against—

TRIANGLE AVIATION SERVICES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK (BRIEANT, J.)

BRIEF FOR PLAINTIFF-APPELLANT

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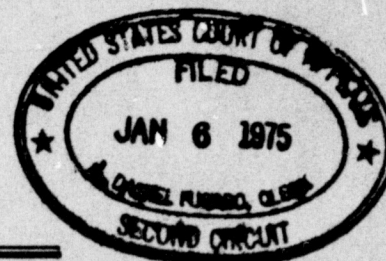


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-2360

AERONAVES DE MEXICO, S.A.,
Plaintiff-Appellant,
-against-
TRIANGLE AVIATION SERVICES, INC.,
Defendant-Appellee.

On Appeal from the United States
District Court for the Southern
District of New York (Brieant, J.)

BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

This brief is submitted by plaintiff-appellant Aeronaves de Mexico, S.A. ("Aeromexico"), seeking reversal of a final judgment entered by the United States District Court for the Southern District of New York (Brieant, J.)

which: (i) granted the motion of defendant-appellee Triangle Aviation Services, Inc. ("Triangle") to dismiss Aeromexico's declaratory judgment complaint; (ii) denied Aeromexico's motion for a stay of arbitration; and (iii) directed Triangle and Aeromexico to proceed to arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 4.

Statement of Issues Presented for Review

The issues presented on appeal are as follows:
(1) whether the Court below erred in failing to declare not arbitrable the issues raised by Triangle in its Demand for Arbitration; and (2) whether the Court below erred in dismissing Aeromexico's complaint seeking a declaratory judgment.

Statement of the Case

This case was commenced by the filing of a declaratory judgment complaint (the "Complaint") by Aeromexico on June 24, 1974 (A-2)* in response to a Demand for Arbitration (the "Demand") served by Triangle on June 5, 1974 (A-32). In the Complaint, Aeromexico sought a judgment declaring that the matters raised in the Demand were

* All references herein to "A- " are to pages in the Appendix.

not arbitrable; simultaneously Aeromexico moved for a stay of arbitration pending the determination of its declaratory judgment suit (A-35).

On July 19, 1974 Triangle moved, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss Aeromexico's Complaint for failure to state a claim (A-89). The motion was heard on July 30, 1974; a Memorandum Decision was issued on September 16, 1974 (A-90); and Final Judgment was entered on September 30, 1974 (A-99).

The Court below dismissed the Complaint, denied Aeromexico's request for a stay of arbitration, and directed the parties to proceed to arbitration. The Court, however, stayed all arbitration proceedings pending disposition of this appeal (A-100).

Statement of the Facts

Aeromexico is an international air carrier serving the United States, Mexico, Canada and other countries. In connection with this service, Aeromexico aircraft regularly fly into and out of John F. Kennedy International Airport, New York ("JFK") carrying passengers and cargo to and from Mexico (A-37).

For some time prior to November 16, 1973 Aeromexico operated DC-8 equipment into JFK and Triangle pro-

vided ground services* for this equipment under a contract between Triangle and Iberia Airlines of Spain ("Iberia") (A-71). On or about November 16, 1973 Aeromexico entered into a separate contract with Triangle -- the contract involved in this action (the "Contract") (A-6).

Prior to entering into the Contract, Triangle submitted proposed charges for the ground services for DC-8 aircraft and in addition it submitted quotations for similar services for the DC-10 (A-85). The Contract as executed provided for the furnishing of ground services for DC-8's at the quoted charges but did not contain any charges for servicing DC-10's and in fact does not mention DC-10's. The Contract also provided that if Aeromexico were to operate a different type of aircraft, "an increase in the charges will be negotiated to the satisfaction of both parties" (A-9, 10).

Some time prior to May 2, 1974 Aeromexico notified Triangle that it intended to operate DC-10 aircraft into and out of JFK and requested that Triangle furnish a quotation of its charges if it were to provide ground services for the DC-10 (A-3). On May 2, 1974 Triangle

* The term "ground services" includes ramp services, baggage handling and aircraft cleaning.

wrote to Aeromexico setting forth a quotation for servicing the DC-10 (A-27).

On May 14, 1974 Aeromexico notified Triangle that the quoted charges were unacceptable and requested that Triangle quote lower charges (A-29). Triangle failed to respond. On May 21, 1974, Aeromexico again asked Triangle to quote lower rates and notified it that such quotation must be received by 5:00 p.m. the following day since Aeromexico's first DC-10 was scheduled to arrive at JFK on May 31, 1974 (A-30).

Triangle did not quote a lower rate and by letter dated May 22, 1974 stated: "Since it appears that we may have reached an impasse, consideration must be given to arbitration rather than to the unilateral actions suggested in your letters" (A-31).

Thereafter, on June 5, 1974, Triangle served its Demand on Aeromexico seeking an award that (i) the Contract binds Aeromexico to employ Triangle's services until December 31, 1975 regardless of the aircraft type utilized by Aeromexico; (ii) all changes in price must be arbitrated; (iii) the prices quoted by Triangle for providing ground services to Aeromexico's DC-10's must be paid; and (iv) Triangle is entitled to damages (A-32, 33).

Aeromexico then instituted this declaratory judgment action. The Complaint asks for judgment that: (i) no contract exists between Aeromexico and Triangle relating to DC-10 aircraft; (ii) Aeromexico is not obligated to deal with Triangle with reference to the DC-10 aircraft; (iii) no arbitrable issue exists; and (iv) Triangle be enjoined from arbitrating matters relating to the DC-10 aircraft (A-5).

The District Court's Memorandum Decision
and Judgment

Judge Brieant, in granting Triangle's motion to dismiss the Complaint and directing arbitration, characterized the issue as "the renegotiation of a price for future services upon the happening of a commercial contingency previously contemplated" (A-94).

The Judge went on to state that "although paragraph 3-3 of the Agreement does not indicate specifically the procedure to be followed if an increase in charges cannot be negotiated to the satisfaction of both parties", the absence of a procedure presents no difficulty since "such failure to agree would give rise to an arbitrable controversy under the instant arbitration clause. At least, the arbitrators could so conclude" (A-94).

Judge Briant also said that absent arbitration, the parties would have no more than "nudum pactum, or an agreement to agree", and that he would not "infer that either party had any such intent" (A-95, 96).

Both the decision and judgment grant the arbitrators "the same plenary jurisdiction to decide all of the issues of fact and law, including the interpretation of the contract, which has been entrusted to them by the arbitration clause previously quoted" (A-98, 100).

ARGUMENT

Aeromexico contends that:

- (1) the issues raised by Triangle are not arbitrable; and
- (2) at the very least the Complaint should not have been dismissed without a trial.

I. f

THE ISSUES RAISED BY TRIANGLE ARE NOT ARBITRABLE

The principal question is whether the Contract provides for the arbitration of an issue involving the determination of the amount to be charged for ground services for DC-10 aircraft. In other words, does the Contract empower an arbitrator to determine the amount of the charges when the parties cannot agree?

Aeromexico submits that: (a) the Contract does not provide for the arbitration of the price for servicing DC-10 aircraft; and (b) the parties did not intend to arbitrate the price for servicing the DC-10.

A. The Contract Does Not Provide
for the Arbitration of the
Price for Servicing the DC-10.

The Contract makes clear that price increases for servicing different aircraft types are to be subject to negotiation and not to arbitration. Paragraph 3-3 of the Contract provides that any increase in service charges due to a change in aircraft type will first be determined by Triangle and will then be "negotiated to the satisfaction of both parties . . ." (A-9, 10). The Contract specifically states that price increases must be negotiated to the satisfaction of both parties. This means to the satisfaction of each of them, not to the satisfaction of a third party.

Aeromexico submits that the parties clearly stated their intention to negotiate price increases and that the parties used language which reserved to themselves the right to determine the price to be charged for servicing different aircraft. The forum which they chose for attempting to establish a price was that of negotiation, not arbitration. Negotiating price to their satisfaction is in direct contravention

to arbitrating, since arbitration necessarily would result in a price unsatisfactory to at least one, if not both, of the parties. By stating that "arbitration was a reasonable means for the parties to use to fix the charges or fees upon failure to agree" (A-95), the lower court in effect wrote an arbitration procedure into paragraph 3-3 of the Contract. In so doing, it plainly exceeded its power.

With respect to contract provisions requiring the satisfaction of a party, leading commentators agree that the manifested intent of the parties should be given effect and that courts should not impose their own judgment as to reasonable procedures. See generally, Williston, Contracts, § 675A (Rev. ed. 1936); Corbin, Contracts, § 646 (1960); Calamari and Petrillo, Contracts, § 151 (1970). Instead of giving effect to the parties' stated intent, the lower court read into the Contract the existence of an agreement which it felt was reasonable and desirable -- an agreement to arbitrate the issues raised by the Demand. It did so in derogation of the principle that an "agreement to arbitrate must be direct and the intention made clear, without implication, inveiglement or subtlety." In the Matter of Doughboy Industries Inc. v. Pantasote Company, 17 App. Div. 2d 216, 219, 233 N.Y.S.2d 488, 492 (1st Dep't 1962). See also, In the

Matter of Riverdale Fabrics Corp. (Tillinghast-Stiles Company), 306 N.Y. 288, 289, 118 N.E.2d 104 (1953).

Contrary to the lower court's conclusion that absent arbitration the parties would have no more than "nudum pactum, or an agreement to agree" (A-95), a contract provision calling for the satisfaction of both parties is both reasonable and desirable. Such provisions have been authoritatively upheld in numerous cases. Thus, in Wynkoop Hallenbeck Crawford Company v. Western Union Telegraph Company, 268 N.Y. 108, 196 N.E. 760 (1935), the New York Court of Appeals held that a contract which provided for the inclusion of overhead and administrative charges satisfactory to the purchaser was terminated when the purchaser merely expressed his dissatisfaction without giving any reasons. The Court stated:

"It is here demonstrated, however, that the allocation of 'administrative and overhead charges' to one of many separate undertakings in a single business is in large degree an affair of individual judgment, -- an interpretation which is not matter of general agreement in the business community. Under settled principles, therefore, the contract phrase 'satisfactory to the Electric Company' is to be read, not as a stipulation for what court or jury would pronounce satisfactory to a reasonable man, but literally as meaning actually satisfactory to defendant personally." 268 N.Y. at 112-13.

Aeromexico submits that the situation in this

case is similar to that in Wynkoop. The establishment of a price for DC-10's by Aeromexico and Triangle involves a number of factors not easily or readily determinable by a third party such as the profit to be realized by Triangle and the choice on the part of Aeromexico to pay a given price. These are matters of individual corporate judgment. Indeed, it is hard to imagine more important matters for individual corporate determination.

Were this matter to go to arbitration, the arbitrator would be faced with the task of determining what the "satisfaction of both parties" would have been had they successfully completed negotiations. This Court was faced with a similar issue in Necchi v. Necchi Sewing Machine Sales Corp., 348 F.2d 693 (2d Cir. 1965), cert. denied, 383 U.S. 909 (1966), where, among other things, the question was whether the terms of a renewal of a distributorship agreement were proper subjects for arbitration. The arbitration clause in Necchi read: "All matters, disputes or disagreements arising out of or in connection with this agreement shall be finally settled by arbitration." 348 F.2d at 695. This Court, in denying the arbitrability of such an issue, stated:

"Certainly, we cannot ask that a renewal contract be written for the parties, as it is altogether conjectural that the parties

would have agreed and on what terms
Absent a clear definitive statement that
the parties wish to litigate or arbitrate
differences over the failure to engage in
discussion relating to a renewal, and absent
some indication as to how damages are to be
fixed in case of a breach, the courts should
hesitate before enforcing such a contract
provision." Id. at 698.

In rejecting Aeromexico's claim that the charge
for servicing DC-10's is not subject to arbitration, the
lower court relied on American Home Assurance Co. v. Amer-
ican Fidelity and Casualty Co., 356 F.2d 690 (2d Cir. 1966),
a case which is wholly inapposite. The issue before the
Court in American Home was the arbitrability of a dispute
over the reinstitution of an insurance premium payable by
Fidelity to American Home. American Home sent Fidelity
an addendum to their reinsurance contract reducing the
premium to be paid by Fidelity by 1/2%. A cover letter
with the addendum stated:

"this reduction * * * is being made on the
understanding that in the event the final
loss ratio on this contract during the years
1955, 1956, and 1957 exceeds 65% of the
Gross Premium, * * * there shall be an ade-
quate amendment of the premium * * * on a
basis to be mutually arranged, but such
amendment shall * * * not [be] retroactive."
356 F.2d at 691.

Thereafter when American Home sought to re-
instate the 1/2% and received no response from Fidelity,

it withheld certain funds which it owed Fidelity under the contract. Fidelity sued to recover the funds and American Home then sought to stay Fidelity's suit and to compel arbitration under the contract. The District Court compelled arbitration and the Second Circuit affirmed.

In contrast to the matter which Triangle seeks to arbitrate in the case at bar, American Home sought merely to reinstate a price which had been previously agreed to by the parties and had been embodied in the underlying contract. Thus, the Court said:

"The letter was clearly intended to be read with the Addendum and hence constituted a modification of the original contract. As such, any dispute with respect to its interpretation or effect was 'in connection with' the contract and within the reach of the arbitration agreement." Id. at 691-92.

The issue presently before the Court is quite distinct from the issue in American Home, since the issue which Triangle seeks to arbitrate involves a subject to which the parties did not agree. Furthermore, unlike the instant case, the party resisting arbitration in American Home had received the benefit of the bargain which it had made -- namely, insurance coverage.

From the foregoing, it is obvious that under the explicit terms of the Contract, which are not disputed, the charges for servicing DC-10's are not subject to arbitration and this Court should direct the entry of judgment in favor of Aeromexico.

B. The Parties Did Not Intend to Arbitrate
the Price for Servicing the DC-10.

It is clear from (1) an examination of the facts leading up to the execution of the Contract, (2) the fact that Triangle prepared the Contract, and (3) Aeromexico's understanding of the Contract, that the parties did not intend to confer upon an arbitrator the power to determine the amount of money that Aeromexico should pay to Triangle for servicing Aeromexico's DC-10's at JFK.

Prior to the execution of the Contract, Triangle sent a letter dated April 5, 1973 to Aeromexico enclosing a draft of the Contract for DC-8 aircraft and proposing a charge for servicing DC-10 aircraft (A-85). The Contract, except for minor changes not material to this case, is the same as the draft enclosed in that letter.

Notwithstanding the suggestion contained in the April 5 letter of a price for the DC-10 aircraft, the Contract did not include any such charge and, in fact, does

not even mention the DC-10. The Contract provides that increased charges resulting from a change in aircraft type shall be negotiated "to the satisfaction of both parties" (A-9, 10). It also provides that "[t]he entire contract between the parties is stated in this instrument" (A-18). The parties' failure to include charges for servicing DC-10 aircraft in the Contract, as suggested in Triangle's April 5 letter, is a clear indication of their failure to agree and underscores their intention to leave the setting of such charges for negotiation and not for arbitration.

The record demonstrates that Aeromexico never intended to abdicate its right to determine the price it would pay Triangle for servicing its DC-10 aircraft (A-40, 88). If Aeromexico had intended to give an unknown third party a blank check, such as Triangle contends, this should have been specifically set forth in the Contract. This is especially true since Triangle previously had a dispute with Iberia over the price of servicing aircraft (A-74). With this experience, had Triangle intended to arbitrate such a dispute, it would have placed a specific provision in the Contract providing for arbitration in the event of a breakdown in negotiations.

In this regard, the arbitration clause in Hamilton Life Ins. Co. of N.Y. v. Republic Nat. Life Ins. Co., 408

F.2d 606 (2d Cir. 1969), a case cited by the lower court, is instructive. There, the parties unlike in the present case specifically provided: "All disputes and differences between the two contracting parties upon which an amicable understanding cannot be reached are to be decided by arbitration" 408 F.2d at 608 (emphasis added).

Since the Contract was drafted by Triangle (A-75, 87), if there is any ambiguity as to arbitration, such ambiguity must be resolved against the draftsman and in favor of Aeromexico. See, e.g., Williston, Contracts § 621 (Rev. Ed. 1936).

Accordingly, the issues raised by Triangle are not arbitrable as evidenced by the explicit terms of the Contract and the intent of the parties.

II.

AT THE VERY LEAST THE COMPLAINT
SHOULD NOT HAVE BEEN DISMISSED
WITHOUT A TRIAL.

Aeromexico contends that on the basis of the undisputed facts set forth in Points IA and IB, supra, (1) the lower court should have held that the price for the rendering of ground services for the DC-10 is not subject to arbitration; (2) the judgment of the lower court should be reversed; and (3) the lower court should be directed to enter judgment for the relief requested in the Complaint.

If this Court should, however, decide that the Contract is sufficiently ambiguous as to require resort to the intent of the parties and that the facts bearing on intent are in dispute, then the Court should reverse the judgment of the lower court and remand the case for the purpose of taking evidence on the question of intent.

In two recent cases, this Court has held that a district court should not determine disputed issues of fact with respect to the making of an arbitration agreement on affidavits. A/S Custodia v. Lessin International Inc., 503 F.2d 318 (2d Cir., 1974); Interocean Shipping Co. v. National Shipping and Trading Corp., 462 F.2d 673 (2d Cir. 1972). In both cases the Court reversed and remanded for an evidentiary hearing. The Court noted that when issues of fact are present regarding the making of the arbitration agreement, Section 4 of the Federal Arbitration Act requires a full trial on the merits.

Plainly the lower court disregarded this well settled principle in dismissing the Complaint without a trial.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the District Court and

(A) direct the District Court to enter judgment that (1) Aeromexico is not obligated to deal with Triangle with reference to servicing its DC-10 aircraft; (2) no arbitrable issue exists under the Contract; and (3) Triangle be enjoined from proceeding with its Demand for Arbitration; or, in the alternative,

(B) remand the case for a full hearing on the merits.

New York, New York
January 6, 1975

Respectfully submitted,

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